LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 30 1974
MICHAEL RODAK, JR., CLERK

No. 73-1216

In the Supreme Court of the United States

OCTOBER TERM, 1973

RUBY DAVIDSON WALDEN AND WILLIAM LUTHER WALDEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1216

RUBY DAVIDSON WALDEN AND WILLIAM LUTHER WALDEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Ruby Davidson Walden and William Luther Walden were convicted of making illegal sales of firearms, in violation of 18 U.S.C. 922. They were fined $500 and $100, respectively. The court of appeals affirmed (Pet. App. 36-57). Petitioners contend that the evidence against them should have been suppressed because it was obtained by three young enlisted Marines working voluntarily in concert with an undercover Treasury agent.

The events leading to the prosecution began when Marine Corporal David L. Durham visited petitioners' store with the intention of buying a firearm (Tr. 20).[1] Petitioner Ruby Davidson Walden informed him that she

[1] "Tr." refers to the transcript of the proceedings at trial.

could not sell a firearm to him because he was under twenty-one, but she suggested that he bring a friend over that age who could sign the necessary papers as buyer (Tr. 3-4, 20). Durham talked about this suggestion with his supervisor, a Staff Sergeant, who reported the matter to a special investigator of the Alcohol, Tobacco, and Firearms Division of the Department of Treasury (Tr. 20, 68-69). At the request of the special investigator, Durham returned to petitioners' store accompanied by a slightly older friend, Corporal Vernon E. Albery (Tr. 7, 20-21), and the sale of the firearm to Durham was effected in the manner which had been suggested by petitioner Ruby Davidson Walden (Tr. 7-9).

After his twenty-first birthday, Durham returned to petitioners' store with a younger friend, Corporal Arthur B. Coleman, III, on whose behalf Durham signed the necessary papers as buyer of another firearm (Tr. 11-13). That sale was made by petitioner William Luther Walden (Tr. 11-12). One week later, Durham again went to petitioners' store, this time with an undercover Treasury agent posing as a customer; the agent informed petitioner Ruby Davidson Walden that he resided in another state, whereupon she told him that she would sell a firearm to him if Durham would sign as buyer, and after some show of hesitation on Durham's part the sale was completed in that manner (Tr. 13-16).

On appeal from their convictions, petitioners contended for the first time that the evidence against them should have been suppressed because it was obtained through an impermissible involvement by the military in civilian law enforcement. The court of appeals held that although the use of Corporal Durham and his friends as undercover agents violated Secretary of Navy Instruction 5400.12, which provides that "it

is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order" (Pet. 10), the evidence was not subject to suppression because (1) the violation of the Instruction was unintentional, (2) no personal rights of petitioners had been infringed, (3) exclusion was not required by "considerations of justice" (*McNabb* v. *United States*, 318 U.S. 332, 341), and (4) the problem was not shown to be a recurrent one calling for the drastic remedy of an exclusionary rule (Pet. App. 53-57).

Petitioners here contend that Corporal Durham's undercover work violated not only the Instruction but the Constitution as well, and that in either event the evidence against them was improperly admitted.

1. Petitioners' contentions were not properly before the court of appeals and are not properly raised here. Petitioners made no objection at trial to the introduction of the testimony of Corporal Durham and the other Marines and thus failed to preserve the issue for appellate review. See Rule 51, Fed. R. Crim. P. Since admission of the testimony was not clearly erroneous and did not adversely affect the integrity and fairness of petitioner's trial, there was no "plain error" to be noticed by the court of appeals under Rule 52(b), Fed R. Crim P.[2] See generally 3 Wright, *Federal Practice and Procedure: Criminal* 372-375.

2. In any event, petitioners' allegation of a constitutional violation is insubstantial. It is true, as this Court has observed, that there is in this

---

[2]Under the proposed amendments of the Rules, promulgated by this Court on April 22, 1974, Rule 12(f) would require that petitioners' claim be treated as waived because not raised prior to trial. This amendment, we believe, simply reflects prior law.

nation "a traditional and strong resistance * * * to any military intrusion into civilian affairs." *Laird* v. *Tatum*, 408 U.S. 1, 15. Whether this resistance is given expression in the Constitution is a question that has yet to be decided. But this case involves no intrusion of the "military." The fact that Durham and his friends happened to be Marines was largely irrelevant to the course of events; they were not acting under orders or in any sense conducting a military operation. They were merely cooperating voluntarily, in their capacities as private citizens, in bringing petitioners to trial for illicit activities which petitioners themselves had brought forcibly to Durham's attention. Durham and his associates used no military equipment and invoked no military prerogatives; they just walked into the store as customers and availed themselves of the arrangements suggested by petitioners. Thus the constitutional issue petitioners raise is not presented by the facts of this case.

3. We disagree with the court of appeals' holding that the investigation here violated the Secretary's Instruction. In the first place, the language of the Instruction is merely precatory; it states a general policy of discouraging the use of military personnel in civilian law enforcement, but it does not purport to prohibit such use in all cases. Secondly, the Instruction is directed at the use of military personnel in "preserving law and order" (Pet. 10); this phrase, we believe, was intended to denote armed police activities, not the type of unarmed investigatory work involved here.

But even assuming *arguendo* that Durham's investigation violated the Instruction, we believe, for the reasons stated in Part III of the opinion below

(Pet. App. 49-57), upon which we rely, that the court of appeals correctly refused to extend the exclusionary rule to the evidence obtained in the course of that investigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.